

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



74-1997

To be argued by  
RICHARD WILE

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**  
**Docket No. 74-1997**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

WILLIAM CRUZ-ARGUNZONI,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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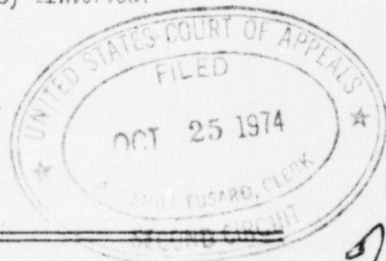
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**BRIEF FOR THE UNITED STATES OF AMERICA**

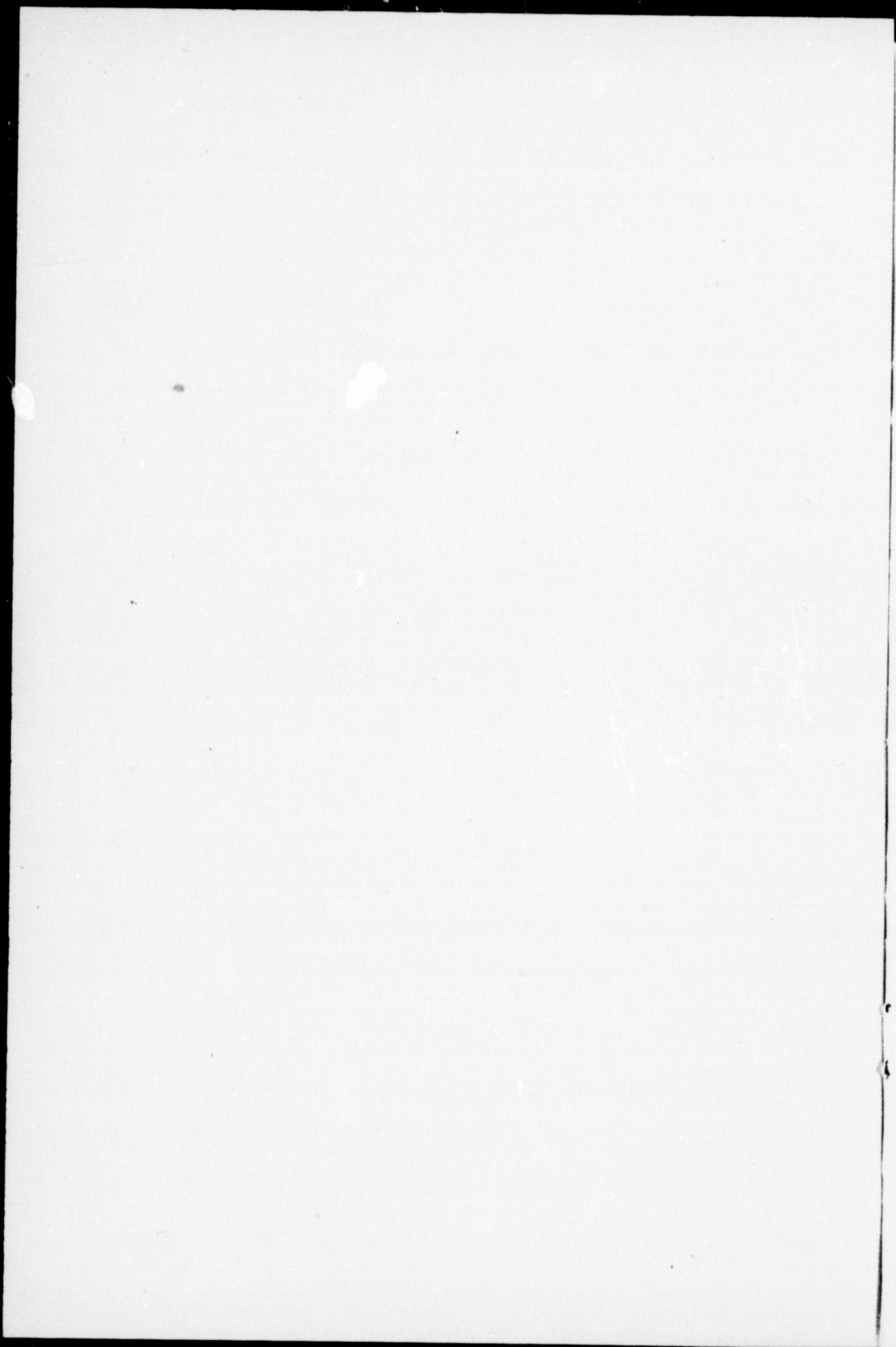
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—v.—

& WILLIAM CRUZ-ARGUNZONI,

*Defendant-Appellant.*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

William Cruz-Argunzoni ("Cruz") appeals from a judgment of conviction entered on July 18, 1974 in the United States District Court for the Southern District of New York after a five day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 74 Cr. 378, filed on April 11, 1974, charged Cruz and co-defendants William Hernandez, Avelino Roman, Juan Alberto Rosa and Gilberto Taboada-De Jesus ("Taboada") in three counts with having transferred firearms without having filed with the Secretary of the Treasury or his delegate ("Secretary") a written application for the transfer and registration of those firearms to the transferee, without having secured the approval of the Secretary for the transfer and registration of those firearms and without having paid the tax due and payable on the

transfer of those firearms, in violation of Title 26, United States Code, Sections 5811, 5812 (a) (1), (2) and (6), 5812(b), 5845(a), (c) and (d), 5861(e) and 5871 and Title 18, United States Code, Section 2. Count One named Cruz and Hernandez and involved the .12 gauge U.S. Arms Co. double barreled, sawed-off shotgun bearing serial number 5837. Count Two named Cruz, Roman and Taboada and involved the .308 caliber Winchester semi-automatic, sawed-off rifle bearing serial number 10336. Count Three named Cruz and Rosa and involved the .12 gauge Parker double barreled, sawed-off shotgun bearing serial number 84856.

The trial of Cruz, Hernandez, Roman and Taboada commenced on May 31, 1974.\* On June 5 Roman pleaded guilty to Count Two. The trial concluded on June 6, 1974 when the jury returned guilty verdicts with respect to Cruz on all counts and acquitted Hernandez and Taboada.

On July 18, 1974 Cruz was sentenced to a six month term of imprisonment on Count One; on Counts Two and Three, the execution of concurrent two year terms of imprisonment was suspended, and Cruz was placed on probation for two years. He is presently free on bail pending appeal.

## **Statement of Facts**

### **The Government's Case**

At approximately 2:00 p.m. on July 27, 1973, Special Agent Louis Diaz of the Bureau of Alcohol, Tobacco and Firearms, while working in an undercover capacity, met Hernandez in the Williamsburgh section of Brooklyn (Tr. 19, 23-24).\*\* Diaz then accompanied Hernandez to Ridge Street on the Lower East Side of Manhattan to meet Hernandez' connection for firearms (Tr. 24-25). At that location Hernandez encountered Cruz and, after a conversa-

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\* Rosa became a fugitive prior to trial.

\*\* "Tr." refers to the trial transcript.



tion between them, Hernandez told Diaz that Cruz had a sawed-off shotgun for sale, which Cruz confirmed (Tr. 26-27). Diaz then drove Hernandez and Cruz to 110 Columbia Avenue, also on the Lower East Side, where Cruz entered his girlfriend's apartment building and returned to Diaz' automobile with the .12 gauge U.S. Arms Co. double barreled, sawed-off shotgun bearing serial number 5837 (GX 1; Tr. 27-28, 32).<sup>\*</sup> Diaz, Cruz and Hernandez then went to Cruz' apartment at 156 Rivington Street, again on the Lower East Side (Tr. 28-29). Diaz assembled the shotgun and Cruz and Diaz agreed on a price of \$75. When Diaz went to his automobile to get the money, Cruz fired the shotgun out a window (Tr. 29). Diaz returned, paid Cruz \$75, and took the shotgun (Tr. 29-30). Diaz gave Cruz a telephone number to call if he learned of other firearms for sale, which Cruz said he would do (Tr. 30). Diaz paid Hernandez \$20 and took him back to the Williamsburgh section of Brooklyn (Tr. 30-31).

At approximately 1:00 p.m. on September 14, 1973 Diaz met Cruz on Ridge Street. Cruz said that he could introduce Diaz at 6:00 p.m. to an individual with two sawed-off shotguns for sale; Diaz agreed to return at 6:00 p.m. (Tr. 34). At 6:00 p.m. that night Diaz and Cruz went to the Silver Line Trucking Company on Stanton Avenue near Ridge Street, where Diaz was introduced to Taboada (Tr. 35). Taboada said he thought an individual who lived on East 119th Street in Manhattan had one shotgun for sale. Diaz, Cruz and Taboada then went to 342 East 119th Street, Roman's residence (Tr. 36, 289-90, 292). Diaz waited in the hallway while Cruz and Taboada entered apartment 6 (Tr. 36). Cruz brought out for Diaz' inspection the .308 caliber Winchester semi-automatic sawed-off rifle bearing serial number 10336 (GX 2; Tr. 38, 46). Diaz took the rifle and gave Cruz \$100; Cruz re-entered the apartment. Cruz later came out, and he and Diaz went to wait

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<sup>\*</sup> "GX" refers to Government's exhibits in evidence.

for Taboada in Diaz' automobile (Tr. 38). Later Taboada arrived and gave Diaz two loaded five-round clips (GXs 2B and 2C) and three loose rounds (GXs 2D, 2E and 2F) of .308 caliber ammunition (Tr. 40, 48-50). During the ride back to Ridge Street Taboada said his connection had given him \$10 for bringing Diaz to buy the rifle. Diaz paid Cruz and Taboada \$20 each for arranging the sale of GX 2 (Tr. 41).

On September 22, 1973 Diaz and Taboada went to 342 East 119th Street, where Diaz was introduced to Roman. Later that day Diaz was told by Roman that he had cut down the .308 Winchester rifle (Tr. 43-45).

On November 19, 1973 at approximately 12:30 p.m. Diaz received a telephone call from Cruz, who said that, in an hour, he could introduce Diaz to a person who had a sawed-off shotgun for sale (Tr. 50-51). At 1:30 p.m. Diaz met Cruz and Rosa on Ridge Street (Tr. 51). Cruz said Rosa was the person who had a sawed-off shotgun for sale and that, if Diaz would wait, they would get it. Cruz and Rosa left and, when they returned to Ridge Street, Diaz got into Rosa's automobile (Tr. 52). Rosa handed Diaz a .12 gauge Parker double barreled, sawed-off shotgun bearing serial number 84856 (GX 3; Tr. 52, 54). Diaz paid Rosa \$140 for the shotgun but said he would not pay Cruz because the price was so high; Cruz said he would be paid by Rosa (Tr. 53).

The Government also established that applications were not filed with the Secretary to transfer and register GXs 1, 2 and 3 \* to Diaz, the approval of the Secretary was not secured to transfer and to register GXs 1, 2 and 3 to Diaz and no taxes were paid upon the transfers of GXs 1, 2 and 3 to Diaz (Tr. 180-86).

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\* GXs 1 and 3 were shotguns and GX 2 was a rifle within the meaning of Title 26, United States Code, Section 5845 (Tr. 171-73).

## The Defense Case

Cruz testified in his own behalf. With respect to Count One, he said he acquired the shotgun on December 4, 1972 for the purpose of giving it to a friend in Pennsylvania who hunted (Tr. 302-03). Cruz claimed he had refused repeatedly to sell the shotgun to Diaz before agreeing finally under pressure (Tr. 306-16).

With respect to Count Three, Cruz stated that Rosa said he had a shotgun for sale for \$140 (Tr. 319-20). Cruz then, at Rosa's request, made a telephone call to Diaz and informed Diaz that there was a firearm for sale (Tr. 321-22). Cruz denied that he received money from Rosa after Diaz purchased Rosa's shotgun (Tr. 325).

With respect to Count Two, Cruz testified that Taboada said he knew somebody who had a rifle for sale, which Cruz told Diaz (Tr. 328). Cruz said he introduced Taboada to Diaz and accompanied them to 119th Street (Tr. 332-33). Cruz said that he went into an apartment with Taboada, where they met Roman's "wife," and that Cruz left the apartment to get the \$100 payment for the rifle (Tr. 337-38). Cruz testified that, after receiving that money, he delivered the rifle to Diaz (Tr. 338). Cruz also testified that he received \$20 from Diaz for helping him purchase the rifle (Tr. 339).

Cruz claimed that, when they first met, Diaz offered to pay Cruz for finding "connections" for firearms and that he would not have gone anywhere with Diaz except for those payments. *id.*

## A R G U M E N T

### P O I N T I

**The alleged fact that Cruz could not have transferred firearms in compliance with the National Firearms Act would not render that statute violative of the Due Process Clause.**

The National Firearms Act ("the Act") provides that a firearm shall not be transferred unless, *inter alia*, an application has been filed with the Secretary, the tax has been paid and the Secretary has approved the transfer (Title 26, United States Code, Sections 5812(a)(1), (2) and (6)). Testimony at trial established that those requirements could not be fulfilled unless the firearms first were registered to the transferor in the National Firearms Registration and Transfer Record (Tr. 193; *see* Title 26, United States Code, Section 5841(b)). Cruz offered to prove that he could not have registered the firearms which were transferred to Diaz and requested an instruction to the jury concerning the impossibility of registration, both of which were denied (Tr. 293-95, 419). Cruz contends either that the denials of his offer of proof and requested instruction were error or that, if impossibility of registration is not a defense to alleged violations of the Act, the statute offends the Due Process Clause. Those contentions are without merit, even assuming *arguendo* that any attempted registration by Cruz would have been futile.\*

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\* Title 26, United States Code, Section 5841(b) would have required the registration to Cruz of GX 1 by the person from whom Cruz obtained it. The evidence at trial established that Roman "made" GX 2 within the meaning of Title 26, United States Code, Section 5845(i); therefore Roman could have registered GX 2 to himself under Title 26, United States Code, Section 5841(b) and Cruz' claims concerning the impossibility of registration do not apply to his conviction on Count Two. It will be assumed that Cruz contends that Rosa could not have registered GX 3 to himself.



The short answer to Cruz' claims is that, if it was impossible for the two shotguns to be transferred legally, they should not have been transferred. *Cf. S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (*en banc*), *cert. denied as Coates v. S.E.C.*, 394 U.S. 976 (1969). Although the precise issue here presented appears not to have been passed upon, in *Milentz v. United States*, 446 F.2d 111, 113 (8th Cir. 1971), a conviction for possession of an unregistered firearm (Title 26, United States Code, Section 5861(d)) was affirmed in the face of an analogous claim by the defendant under the Equal Protection Clause that he was legally incapable of validating his possession by registration with the Secretary. *See also United States v. Freed*, 401 U.S. 601, 603-04 (1971); *United States v. Ackerson*, Dkt. No. 74-1064 (8th Cir., August 29, 1974), slip op. at 7-8; *United States v. Tankersley*, 492 F.2d 962, 967 (7th Cir. 1974); *United States v. Sanders*, 462 F.2d 122, 124 (6th Cir. 1972).

## POINT II

**Knowledge of the statute is not an element of a violation of Title 26, United States Code, Section 5861(c).**

In *United States v. Freed*, *supra* at 609, the Supreme Court held that the Act "is a regulatory measure in the interest of the public safety" and that knowledge of the Act is not an element of its violation.

The language of the indictment charging that Cruz acted "knowingly" was properly explained to the jury by Judge Bonsal as requiring only a finding that Cruz knew the character of the objects transferred. *See United States v. Freed*, *supra*, 401 U.S. at 607; *Sipes v. United States*, 321 F.2d 174, 179 (8th Cir.), *cert. denied*, 375 U.S. 913 (1963). To the extent the indictment could have been read to

require a knowing violation of law, such language is mere surplusage which was subject to being stricken had that relief been requested. *See Milentz v. United States, supra*, 446 F.2d at 114, and cases cited.

### POINT III

**The Government was not required to prove that GXs 1, 2 and 3 were not "antique firearms" within the meaning of Title 26, United States Code, Section 5845(g).**

Title 26, United States Code, Section 5845(a) provides:

"Firearm.—The term 'firearm' means (1) a shotgun having a barrel or barrels of less than 18 inches in length; . . . (3) a rifle having a barrel or barrels of less than 16 inches in length . . . The term 'firearm' shall not include an antique firearm . . ."

The term "antique firearm" is defined in Title 26, United States Code, Section 5845 (g):

"Antique firearm.—The term 'antique firearm' means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlocks, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade."

Cruz frivolously contends that the Government failed to meet its burden of proof that GXs 1, 2 and 3 were "firearms" because the Government did not prove that these

exhibits were not within the "antique firearm" exception. The Supreme Court held long ago:

" . . . By repeated decision it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it . . . ." *McKelvey v. United States*, 260 U.S. 353, 357 (1922) (citations omitted).

*See Edwards v. United States*, 312 U.S. 473, 482-83 (1941); *United States v. Messina*, 481 F.2d 878, 880 (2d Cir.), *cert. denied*, 414 U.S. 974 (1973); *United States v. Fabric Garment Co.*, 262 F.2d 631, 638 (2d Cir. 1958), *cert. denied*, 359 U.S. 989 (1959); *United States v. DePorceri*, 161 F.2d 526, 528 (2d Cir. 1947). Consequently, the trial court did not err in refusing to grant Cruz a judgment of acquittal.

Nor did the trial court err in refusing to submit the question whether GXs 1, 2 and 3 were within the "antique firearm" exemption to the jury. Gunnar Erickson, the only trial witness qualified as a firearm expert, testified that those exhibits were made after the date in the exemption, 1898 (Tr. 169-71, 177). The testimony with respect to their dates of manufacture cited by Cruz was by James Cain, a custodian of the National Firearms Registration and Transfer Record, who was not qualified as a firearms expert and was admittedly guessing (Tr. 180, 187-88). Moreover, the record is absolutely barren of any testimony either that GXs 1, 2 or 3 were "not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition" or that they used ammunition "no longer manufactured in the United States and . . . not readily available in the ordinary channels of commercial

trade" (Title 26, United States Code, Section 5845(g)).\* Certainly the issue of a possible defense need not be submitted to the jury when the trial record is devoid of competent evidence which would sustain that defense. See *United States v. Clark*, 498 F.2d 535, 537 (2d Cir. 1974); *United States v. Nieves*, 451 F.2d 836 (2d Cir. 1971); *United States v. Riley*, 363 F.2d 955, 959 (2d Cir. 1966).

#### POINT IV

##### **Cruz' other contentions are frivolous.**

Cruz argues that, because Title 26, United States Code, Section 5812(b) provides that a transferee shall not take possession of a firearm until the Secretary has approved the transfer, no "transfer" of the firearms here occurred. Such argument simply ignores the definition of "transfer" in Title 26, United States Code, Section 5845(j) :

"Transfer.—The term 'transfer' and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of."

Moreover, the fact that Section 5812(b) forbids a transferee's taking of possession without the Secretary's approval of the transfer merely makes possession without such approval unlawful and in no way controls whether that possession exists or not.

Cruz also claims that, because Title 26, United States Code, Sections 5852(a) and 5853(a) exempt transfers to the United States from the statutory tax, the transfers of the firearms were exempt from the requirements of the Act.

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\* The Court can certainly take judicial notice that .12 gauge shotgun shells are commonly and readily available.



First, those sections\* do not exempt such transfers from the registration and approval requirements of the Act (Title 26, United States Code, Sections 5812(a)(1) and (6)). Second, those exemptions are only available to transfers for which application has been made pursuant to Title 26, Code of Federal Regulations, Sections 179.89 and 179.90 (Title 26, United States Code, Sections 5852(f) and 5853(c)). *United States v. Gillis*, 474 F.2d 4 (9th Cir. 1973). Such applications were plainly not made here.

### CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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*United States Attorney for the  
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RICHARD WILE,  
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\* Section 5853(a) is in any event inapplicable, since the transfers here cannot be said to have been made to a "possession of the United States."



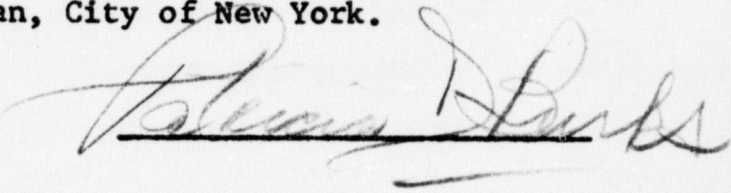
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State of New York     )  
County of New York    )

Patricia D. Burks           being duly sworn,  
deposes and says that   he is employed in the office of  
the United States Attorney for the Southern District of  
New York.

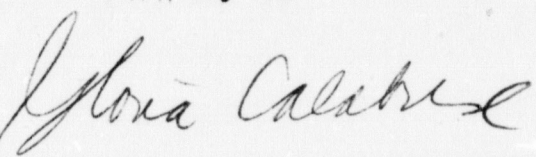
That on the 25th day of       October, 1974  
he served a copy of the within       Brief  
by placing the same in a properly postpaid franked  
envelope addressed: Benjamin J. Golub  
10 East 40th Street  
New York, New York, 10016

And deponent further says that he sealed the said en-  
velope and placed the same in the mail       drop for  
mailing                   the United States Courthouse, Foley  
Square, Borough of Manhattan, City of New York.



Sworn to before me this

~~25th~~ 25th day of   October, 1974



GLORIA CALABRESE  
Notary Public, State of New York  
No. 24-0535340  
Qualified in Kings County  
Commission Expires March 30, 1975